United States Court of Appeals

for the Second Circuit

PETITIONER'S BRIEF

NOS. 74-1579 & 74-1568

Nos. 74-1579 and 74-1568

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PETER J. BRENNAN, Secretary of Labor,

Petitioner,

v.

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION and UNDERHILL CONSTRUCTION CORPORATION,

Respondents.

UNDERHILL CONSTRUCTION CORP. and DIC CONCRETE CORP., Individually and as participants in a Joint Venture known as DIC-UNDERHILL, A JOINT VENTURE,

Petitioners,

v.

PETER J. BRENNAN and OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION,

Respondents.

ON PETITIONS TO REVIEW AN ORDER OF THE OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

BRIEF FOR THE SECRETARY OF LABOR

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BRIEF FOR THE SECRETARY OF LABOR

QUESTIONS PRESENTED

1. Whether the Occupational Safety and Health Review Commission erroneously held 29 C.F.R. 1926.250(b)(1), the pertinent safety standard, inapplicable to material stored near and overhanging the outer edges of a building under construction.

2. Whether an employer who creates and controls a safety hazard violates 29 U.S.C. 654(a)(2).

STATEMENT OF THE CASE

1. Nature of the Case

This case is before the Court pursuant to Sections 11(a) and (b) of the Occupational Safety and Health Act of 1970 (OSHA) (84 Stat. 1590, 29 U.S.C. 651 et seq.) on petition of the Secretary of Labor and cross-petition of Dic-Underhill to review an order of the Occupational Safety and Health Review Commission issued March 7, 1974 (A. 49). This Court has jursidiction under 29 U.S.C. 660(a) and (b), the alleged safety violations having occurred in the Bronx, New York.

2. Facts found by the Commission

Dic-Underhill, a joint venture composed of Underhill Construction and Dic Concrete corporations, is engaged in heavy concrete construction which affects interstate commerce, and employs 1,000 workers daily (A. 51). In November 1972 it was engaged as a subcontractor constructing the structural concrete portions of four high-rise buildings designated buildings A, B, C, and D, in the Harlem River Park Housing Project.

On November 22, 1972, OSHA compliance officer Henry Grudzwick conducted a routine inspection of buildings C and D (A. 57). At the time the buildings had reached a height of 21 floors (A. 55). On the eleventh floor of building C

he observed a pile of shoring material consisting of beams 4 inches square and 8 feet long. The beams were stacked about 5 feet high and 4 feet wide, and the entire stack extended a foot over the unguarded edge of the floor (A. 57-58). When Grudzwick went to the edge of the floor next to the overhanging material he saw "[p]eople walking down below" and bricklayers working directly beneath the overhang on a scaffold at the fourth floor level (Tr. 13).[1/] On the fourteenth floor of building D Grudzwick observed steel braces used to make concrete forms stacked in a three-foot-square-pile which extended a foot over the unguarded edge of the building (A. 58). Directly below this overhang Grudzwick observed bricklayers working on a scaffold and workers of "different trades walking by" (A. 58). The bricklayers were not employees of Dic-Underhill, but it was stipulated that Dic-Underhill's workers had created these hazards and that Dic-Underhill had control of the hazardously placed materials (A. 52, 58, 61; Tr. 6, 13). Moreover, Dic-Underhill had 437 employees at the site (A. 56; Tr. 39).

3. Administrative Proceedings

As a result of this inspection the Secretary on January 3, 1973 cited Dic-Underhill for a nonserious violation of Section 5(a)(2) of the Act for failing "to ensure

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1/ "Tr." references are to the transcript of testimony taken before Judge Chodes on April 24, 1973 which comprises Vol. I of the Certified Record.

that material stored inside buildings under construction shall not be placed within . . . 10 feet of an exterior wall which does not extend above the top of the material stored" (A. 11).[2/] A $35 penalty was proposed (A. 10), and Dic-Underhill was ordered to correct the hazardous condition immediately (A. 10-14). The company timely contested the citation pursuant to 29 U.S.C. 659(c) and the case was heard by an administrative law judge who found the facts we have previously summarized (A. 49-51).

At the hearing, Dic-Underhill contended that (1) the standard under which the citation issued, 29 C.F.R. 1926.250, was not applicable to contracts negotiated prior to April 28, 1971,[3/] and (2) no violation of the standard

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2/ Section 5(a)(2), 29 U.S.C. 654(a)(2), provides that every employer "shall comply with occupational safety and health standards promulgated under this Act." See also 29 U.S.C. 651(3), 652(5). 29 C.F.R. 1926.250(b)(1), the pertinent standard, provides that "material stored inside buildings under construction shall not be placed within 6 feet of any hoistway or inside floor openings, nor within 10 feet of an exterior wall which does not extend above the top of the material stored".

Section 17(k), 29 U.S.C. 666(j), defines a serious violation as one which creates "a substantial probability that death or serious physical harm could result from a [violative] condition which exists . . . in [a] place of employment. . . ." Section 17(c), 29 U.S.C. 666(c), defines a nonserious violation as one which is "not . . . serious".

3/ The company relied upon the effective date specified in 29 C.F.R. 1926.1050, but the administrative law judge held that 29 C.F.R. 1910.17(a) made the standard applicable as of August 27, 1971 without regard to the date of the contract negotiations (A. 52-54).

had occurred because Dic-Underhill employees had not been shown to have been exposed to the hazardous condition. The administrative law judge ruled that that standard was in effect for all construction projects on the date of the inspection, November 22, 1972, and thus was applicable to the company's construction activities (A. 52-54). However, the judge held on two alternative grounds that no violation had been established. First, he held that 1926.250(b)(1)

> in pertinent part, prohibits storing of material 'within 6 feet of any hoistway or inside floor openings'. . . . In the instant case, the material was stored at the outer edges of the floors. The intent of the standard appears to be to prevent material from falling into openings in the floors, and not to protect material from falling off the floors and outside the building . . . the standard was not violated by the storage of material at the peripheral edges of the floors. [A. 58-59 (emphasis in original)]

Alternatively, the judge held that no violation had occurred because no Dic-Underhill workers "were exposed to the hazard contemplated by the standard, namely being struck by falling material" (A. 59). In support of this result, the administrative law judge stated that "only where employees of a cited employer are affected by noncompliance with a standard can such an employer be in violation of Section 5(a)(2) of the Act" (Id.). The judge accordingly vacated the Secretary's citation (A. 63). The Commission, over Chairman Moran's dissent, summarily affirmed noting

that "the Judge has correctly disposed of all material issues" (A. 72). These petitions for review followed.

STATUTE AND REGULATION INVOLVED

Section 5(a) of the Occupational Safety and Health Act, 29 U.S.C. 654(a) provides:

> §654. Duties of employers and employees.
>
> (a) Each employer—
>
> (1) shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees;
>
> (2) shall comply with occupational safety and health standards promulgated under this chapter.

29 C.F.R. 1926.250(b)(1) provides:

> (b) Material storage.
>
> (1) Material stored inside buildings under construction shall not be placed within 6 feet of any hoistway or inside floor openings, nor within 10 feet of an exterior wall which does not extend above the top of the material stored.

ARGUMENT

I.

THE COMMISSION ERRED IN HOLDING 29 C.F.R. 1926.250(b)(1) INAPPLICABLE TO MATERIALS OVERHANGING THE EDGES OF BUILDINGS UNDER CONSTRUCTION.

As summarized earlier, pp. 3-4, the administrative law judge found that a five-foot-high stack of heavy shoring timbers owned and controlled by Dic-Underhill extended a foot over the unguarded edge of building C's eleventh floor, and that a similar stack of steel braces owned and controlled by Dic-Underhill overhung the unguarded edge of building D's fourteenth floor. The evidence also showed, and the judge found, that different tradesmen employed on the Harlem River Park project passed directly beneath these overhanging materials at ground level, and that bricklayers were working on scaffolds below both overhangs. Yet the judge held as his first ground for vacating the citation that no violation of 1926.250(b)(1) had been established because the standard "in pertinent part, prohibits storing of material within 6 feet . . . inside floor openings" and was therefore intended "to prevent material from falling into [interior] openings in the floors, and not to protect material from falling off the floors and outside the building" (A. 58) (emphasis supplied).

This was patently erroneous. The standard states that "[m]aterial stored inside buildings under construction shall not be placed within 6 feet of any hoistway or inside floor openings, nor within 10 feet of an exterior wall which does not extend above the top of the material stored" (emphasis supplied). It accordingly contemplates not merely material falling through interior floor holes, but precisely the hazard of material falling from a building's exterior which the Commission found to be beyond its reach. That such a hazard was created by Dic-Underhill here is plain. The cited materials were not only stored within ten feet of exterior walls, but overhung those walls in a manner likely to result in accidental dislodgements and falls of over a hundred feet. Indeed, the judge implicitly acknowledged that this hazard was both present and prohibited by the standard, since he stated elsewhere in his opinion that "none of [Dic-Underhill's] employees were exposed to the hazard contemplated by the standard, namely, being struck by falling material" and "[t]he only persons endangered by the possibility that the stored material would fall [outside the building] were workmen not employed by [Dic-Underhill]" (A. 59) (emphases supplied). His first holding thus was patently erroneous.[4/]

4/ We might add that the administrative law judge's grudging approach to the standard was no way to construe remedial social legislation, see, e.g., Brennan v. OSHRC

(continued on next page)

II.

THE COMMISSION ERRED IN HOLDING THAT THERE COULD BE NO VIOLATION OF THE STANDARD ABSENT ACTUAL EXPOSURE OF DIC-UNDERHILL'S EMPLOYEES.

As noted earlier, the judge found that at the time of the inspection there were 437 Dic-Underhill employees on the jobsite, as well as numerous unidentified tradesmen and two groups of bricklayers passing by or working below the overhanging lumber and steel braces. Nonetheless the judge vacated the Secretary's citation on the alternative ground that "none of [Dic-Underhill's] employees were exposed to . . . being struck by falling material" and that absent such exposure a 5(a)(2) violation could not be sustained (A. 59). According to this holding, as affirmed by the Commission, Dic-Underhill had no duty to correct the hazard which it had created and which directly threatened numerous workers even though the materials were stored in a manner proscribed by an OSHA safety regulation. This alternative holding was erroneous, and also requires reversal.

4/ (continued) and Gerosa, Inc., 491 F. 2d 1340, 1341 (C.A. 2, 1974), accord: Peyton v. Rowe, 391 U.S. 54 (1968); Phillips Co. v. Walling, 324 U.S. 490, 493 (1945); Reliable Coal Corp. v. Morton, 478 F. 2d 262 (C.A. 4, 1973). See Ryder Truck Lines v. Brennan, ___ F. 2d ___, slip. op. pp. 5921-23 (C.A. 5, No. 73-3341, decided July 18, 1974); American Smelting and Ref'g. Co. v. OSHRC and Brennan, ___ F. 2d ___, slip. op. pp. 13-14 (C.A. 8, No. 73-1721, decided July 15, 1974). Nor did it give the Secretary's interpretation of his own regulation its due. E.g., Udall v. Tallman, 380 U.S. 1, 16-17 (1965); Brennan v. Southern Contractors Service, 492 F. 2d 498, 501 (C.A. 5, 1974).

A. Potential Exposure of an Employer's Workers to a Hazard is Sufficient to Impose Safety Responsibilities Under the Act.

We note at the outset that there is in fact no evidence to support the Commission's finding that Dic-Underhill employees were not directly exposed to the cited hazard. The testimony did not indicate who employed the tradesmen walking beneath the overhangs and it is certainly fair to construe the standard as designed to protect Dic-Underhill employees from falling over the sloppily stored materials to their death.

But, even assuming arguendo that Dic-Underhill's 437 employees were not directly exposed to the hazard of falling materials at the time of the inspection, they were plainly potentially exposed, since the hazardous areas were accessible to them. The Act's preventative purposes, its legislative history, and existing OSHA decisions all demonstrate that such potential exposure is sufficient to hold an employer responsible for creating a safety hazard. We also demonstrate that in a multi-employer project it is unconscionable to allow one employer to booby trap a jobsite used by other employees.

1. The Act recites that its purpose is to relieve interstate commerce "so far as possible" of the burden of job-related injuries. 29 U.S.C. 651.[5/] It also provides that employees may request federal inspections if they believe that a hazard exists which "threatens physical harm", and defines a "serious safety violation" as one which creates a "substantial probability that death or serious physical harm could result" from its presence. 29 U.S.C. 657(f)(1), 666(j) (emphasis supplied). Also, 29 U.S.C. 662(a), empowers the district court to enjoin upon petition of the Secretary hazards "which could reasonably be expected to cause death or serious physical harm immediately or before the imminence of such danger can be eliminated" through normal enforcement procedures. These provisions obviously contemplate that potential exposure to a hazard is of itself a violation of the Act.

5/ As Congress noted while considering this legislation: "The on-the-job health and safety crisis is the worst problem confronting American workers, because each year as a result of their jobs over 14,500 workers die. In only four years time, as many people have died because of their employment as have been killed in almost a decade of American involvement in Vietnam. Over two million workers are disabled annually through job-related accidents.

"The economic impact of occupational accidents and diseases is overwhelming. Over $1.5 billion is wasted in lost wages, and the annual loss to the Gross National Product is over $8 billion. Ten times as many man-days are lost from job-related disabilities as from strikes, and days of lost productivity through accidents and illnesses are ten times greater than the loss from strikes" (Leg. Hist. 844-845).

2. The legislative history persuasively indicates that Congress sought to assure safety by requiring employers to discover and correct hazards before either an accident or an immediate danger to their employees occurred.[6] As the House Labor Committee stated:

> Death and disability prevention is the primary intent of this bill. Although possible penalties for violations may be an important deterrent, they are only a partial solution. If we are to reduce disabilities and fatalities, it is essential that we guarantee adequate warning of possible hazards Leg. Hist. 853 (Emphasis supplied).
>
> [B]y not attaching a penalty to [non-willful] violations the Committee is reaffirming its belief that if employers are warned of potential danger, they will remedy a deterioration in working conditions Leg. Hist. 856 (Emphasis supplied). [7]

3. In accord with the Congressional intent the Commission's judges have repeatedly held that potential employee exposure to a hazard is sufficient to invoke their

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6/ E.g., Leg. Hist. 142-144, 149-150, 152-154, 161-162, 851-853, 855-856, 865, 991-992, 1186, 1217.

7/ The House subsequently rejected the Committee's thesis that penalties were not needed to ensure employer abatement of potential hazards, and adopted a version which required penalties for all serious violations and permitted penalties of up to $1,000 for nonserious ones. 29 U.S.C. 666(b) and (c).

employer's safety responsibilities under the Act.[8/] For example, it has been held that the presence of defective equipment constitutes a violation, without a proof of its actual use. One Commission judge noted:

> It would be an undue burden on the [Secretary] to require a showing of actual use of defective equipment. Any such requirement would cause the compliance officer tc wait around in hopes of someone using [it and] . . . would result in a cat-and-mouse game. . . . More importantly, it would expose an employee to a hazard prior to the Secretary being able to require it to be corrected. . . . The objective[s] of the Act can best be accomplished by placing emphasis on the accessibility of the employee to the defective equipment. If the defective equipment is available for use by the employee and a standard is violated, then a citation should issue [unless the employer has taken reasonable steps to deny his employees accessibility]. Under such circumstances, the employee is exposed to a potential hazard even if he is not using the equipment. . . . The equipment is accessible to him and could be used.

8/ E.g., Secretary v. Palmer-Christianson, OSHRC No. 3108, 3 CCH OSHG Para. 17,204 (Jan. 22, 1974; review directed Feb. 22, 1974); Secretary v. Sletton Const'n. Co., OSHRC No. 967, 1971-73 CCH OSHD Para. 15,453 (Feb. 1, 1973; review directed Feb. 27, 1973). See Secretary v. A. L. Amaral, OSHRC No. 2515, 3 CCH OSHG Para. 17,200 (Jan. 22, 1974; review directed Feb. 22, 1974). Secretary v. City Wide Tuckpointing Service Co., OSHRC No. 247, 1971-73 CCH OSHD Para. 15,767 (May 24, 1973), exclusively relied on by the Commission for its contrary result, is factually distinguishable. That case contained no evidence that employees of any employer were exposed either actually or potentially to the cited hazard.

Secretary v. Allied Electric Co., OSHRC No. 433, slip op. p. 16, digested at 1971-73 CCH OSHD Para. 15103 (June 23, 1973) (emphases supplied). 9/

To interpret this revolutionary worker protection Act in a manner which allows preventable hazardous conditions to go unsanctioned and unabated is contrary to its purpose. Such an interpretation requires compliance officers to await direct employee exposure to obvious safety hazards; dictates that workers enter danger zones as a prerequisite to enforceable citations; condones greater neglect "rather than eliciting greater responsiveness on the part of employers", Brennan v. Southern Contractors Service, 492 F. 2d 498, 501 (C.A. 5, 1974); and undermines the courts' repeated declarations that the Act's purpose is to eliminate hazardous exposure before it occurs rather than penalize employers for job-related injuries which result from such exposure. See Brennan v. Gerosa, Inc., 491 F. 2d 1340, 1344 (C.A. 2, 1974); Brennan

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9/ The judge ultimately vacated the Allied Electric citation because the employer pleaded and proved that he had taken effective steps to eliminate worker exposure by placing the defective equipment in a locked tool compartment, but here, however, Dic-Underhill did not even assert that it had attempted to restrict its employees' exposure to the hazard. The area beneath the overhangs was freely accessible to its 437 workers on the busy, crowded site.

Moreover, Dic-Underhill's employees were clearly exposed to an additional hazard resulting from the cited violation since they were responsible for unstacking the dangerously stored material (Tr. 30). Cf. REA Express, Inc. v. Brennan and OSHRC (C.A. 2, No. 73-1468, decided April 18, 1974).

v. VyLactos Laboratories, Inc., 494 F. 2d 460, 463 (C.A. 8, 1974); National Realty and Const'n. Corp. v. Brennan, 489 F. 2d 1257, n. 6, 1265-66 (C.A.D.C., 1973); American Smelting and Refining Co. v. Brennan, ___ F. 2d ___ (C.A. 8, No. 73-1721, decided July 15, 1974).[10]

B. An Employer Who Controls a Work Place is Liable for the Violation of Safety Standards.

The Commission erred for another reason as well. Dic-Underhill created and controlled the hazard and is necessarily responsible for it.

The keystone of the Act is "the criterion of preventability". National Realty and Const'n. Corp. v. Brennan, supra, 489 F. 2d at 1266-67. The goal of accident prevention can be achieved only if an employer's control[11] over a hazardous condition carries with it a corresponding duty to correct that condition. See Brennan v. OSHRC and Gerosa, Inc., supra, 491 F. 2d at 1342, n. 4.

10/ We suggest at minimum where the Secretary shows the existence of a specifically proscribed hazard and the presence of an employer's workers in that hazard's general area, the burden should shift to the employer to plead and prove that he took reasonably effective affirmative steps to limit direct exposure and the consequent chance of employee harm. See N.L.R.B. v. Great Dane Trailers, 338 U.S. 26,33-34 (1967); Arnold v. Kanowsky, 361 U.S. 388, 392 (1960); N.L.R.B. v. Mastro Plastics Corp., 354 F. 2d 170, 176-177 (C.A. 2, 1965), certiorari denied, 384 U.S. 972.

11/ The courts have recognized the importance of control in the context of labor relations law by holding that an employer who possesses a right to control working conditions may be boycotted and picketted by other employer's workers whom those conditions affect. E.g., Carpenters Local 742 v. NLRB, 444 F. 2d 895 (C.A.D.C., 1971), certiorari denied, sub nom. J.I. Simmons Co. v. Carpenters, 404 U.S. 986; American Boiler Mfrs. Ass'n. v. NLRB, 404 F. 2d 556, 559 (C.A. 8, 1958).

It seems obvious that relieving employers like Dic-Underhill from any responsibility for safety hazards which they can eliminate and which directly endanger employees of other subcontractors and potentially expose their own undercuts the Act's purpose. This is sufficiently clear where a subcontractor creates a specifically-proscribed hazard -- e.g., a concealed roof hole or an unstable materials hoist -- and subsequently leaves the jobsite for a week to other subcontractors and their employees. It is also compellingly clear where, as here, a hazard which endangers other subcontractors' workers is created by an employer who continues actively to maintain it, since the affected subcontractors are without power to inspect the controlling employer's operations, let alone to order discovered dangers abated. In these circumstances, if the controlling employer is not responsible for abatement the affected subcontractors have only two meaningful options to protect their workers even if they discover the hazard: calling their men off the jobsite, or filing a complaint in the hope that official inspection and citation will remove the danger before an accident occurs. See 29 U.S.C. 657(f)(1) and (2). But the first option involves economic hardship and the second relies on an inspector's actual presence to secure abatement -- a result which subjects employees to continued exposure until the inspector arrives and is inconsistent with the Act's emphasis on swift

preventive abatement. While these options may be necessary in last-resort situations, it is illogical to make them the sole remedy in lieu of placing responsibility for abatement of a hazard upon the employer who creates it.

Section 5(a)(2),[12] under which Dic-Underhill was cited, flatly requires employers to "comply with occupational safety . . . standards promulgated under this Act" -- standards which are elsewhere described without qualification as "mandatory [requirements for] . . . business affecting interstate commerce". Supra, p. 6; 29 U.S.C. 651(3).[13] The duty imposed upon the employer by this subsection is not limited to compliance with standards where a violation would endanger his employees. The Commission has erred.

12/ Section 5(a)(2) provides:

> Each employer—
>
> * * * * *
>
> (2) shall comply with occupational safety and health standards promulgated under this chapter.

13/ See also 29 U.S.C. 666(j), which defines a serious violation as one creating "a substantial probability that death or serious physical harm could result" without limitation to an employer's own employees.

CONCLUSION

For the above reasons, the Commission's order should be set aside and the Secretary's citation and proposed penalty reinstated.

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SEPTEMBER, 1974.

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